Supreme Court, U.S.

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No.

In the Supreme Court of the United States

THOMAS RICHARD,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE EIGHTH DISTRICT COURT OF APPEALS
CUYAHOGA COUNTY, OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the search warrant affidavits set forth probable cause for the searches made in this case and whether the seizure of certain funds can be defended, where the same was not particularly described as required by the Fourth Amendment.
2. Whether, in the absence of proof the officers were refused admittance to execute a search warrant, the Court can arbitrarily disregard the testimony of various defense witnesses that no announcement whatsoever was made and rely solely on the testimony of the police who claim they waited two seconds before using a battering ram on the door and physically abusing the occupants and devastating premises.
3. Whether due process is denied when, for reasons that cannot be defended, the trial court refuses to require the State to divulge the identity of the alleged informant who was said to have been the purchaser (and thus a participant) in the alleged drug sale centralized in the case against the accused.
4. Whether verdicts finding an accused guilty were supported by sufficient evidence.
5. In ordering the forfeiture of funds seized from one's home (incident to the execution of a search warrant), can the Court do so without regard to the fact that no *nexus* was shown, or even sought to be shown, between the funds involved in the seizure and any criminal activity?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW vii

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED vii

CONSTITUTIONAL AND STATUTORY PROVISIONS viii

STATEMENT OF THE CASE 1

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT 13

ARGUMENT NO. I:

Although all search warrants are presumed valid and their execution reasonable, such presumption cannot overcome proof showing the affidavit failed to set forth a probable cause basis for the search of, or the seizure of certain funds from, the petitioner's home. 14

ARGUMENT NO. II:

Given the officers' testimony that the forcible entry into a home followed within 2-3 seconds of their knock, even if this were true, such an entry (gained by the use of a battering ram) was nonetheless unlawful and indefensible, and, given the absence of any proof the occupants refused admittance to the officers, the conclusion that the warrant was illegally executed is clear enough. 17

ARGUMENT NO. III:

Due process is denied when, for reasons that cannot be defended, the trial court refuses to require the state to divulge the identity of the alleged informant who was said to have been the purchaser (and thus a participant) in the alleged drug sale centralized in the case against the accused. 20

ARGUMENT NO. IV:

Verdicts finding the accused guilty were not supported by sufficient evidence. 24

ARGUMENT NO. V:

In ordering the forfeiture of funds seized from an individual's home the court cannot do so without regard to the fact that no nexus was shown, or even sought to be shown, between the funds involved and any criminal activity. . . 26

CONCLUSION 29

APPENDIX

Appendix "A"-
Opinion of the Eighth District Court Of Appeals, Cuyahoga County, Ohio (Journalized December 20, 2000) 1a

Appendix "B" -
Entry Of The Supreme Court Of Ohio (Filed May 2, 2001) 27a

TABLE OF AUTHORITIES

Cases

Page

Illinois v. Gates, 462 U.S. 231, at 236 (1962) 13

Massachusetts v. Lewin, 405 Mass. 566, 542 N.E. 2d 275 (Mass. 1989) 21

Richards v. Wisconsin, 520 U.S. 385 (1997) 17

Roviaro v. United States, 353 U.S. 53 (1957) 21

State v. Dodson, 43 Ohio App. 2d 31 (8th District 1974) 25

State v. Olsen, 726 F.2d 1347 (Kansas, 1986) 21

United States v. Alexander, 740 F. Supp. 437 (N.D. Ohio, 1990) 25

United States v. All Assets Of Statewide Auto Parts, Inc., 971 F.2d 896, 905 (2d Cir. 1992) 27

United States v. Baro, 15 F.3d 563, 568 (6th Cir. 1993) 27

United States v. Cortina, 630 F.2d 1207, 1213 (7th Cir. 1980) 25

United States v. Nabors, 901 F.2d 1351, 1355 (6th Cir. 1990) 19

United States v. One Residence and Attached Garage Of Anthony J. Accardo, 603 F.2d 1231, 1234 (7th Cir. 1979) 27

United States v. $5,000 In United States Currency, 40 F.3d 846, 850 (6th Cir. 1994) 27

United States v. $67,220.00 In United States Currency, 957 F.2d 280, 285 (6th Cir. 1992) 27

United States v. $87,118.00 In United States Currency, 95 F.2d 511, 518 (7th Cir. 1996) 28

Wilson v. Arkansas, 514 U.S. 927, 933 (1995) 18

OTHER AUTHORITIES

Revised Code of Ohio, §2923.12 1
Revised Code of Ohio, §2923.24 1
Revised Code of Ohio, §2925.03 1
Revised Code of Ohio, §2925.11 1
Revised Code of Ohio, §2935.12 17
Sexton, *New York Police Often Lie Under Oath, Report Says* (Times, April 22, 1994, p. 1) . . . 25
Title 28, U.S.C., §1257(a) vii

PETITION FOR WRIT OF CERTIORARI

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, Thomas Richard, respectfully prays that a Writ of Certiorari issue to review the judgment of the Eighth District Court of Appeals, which judgment became final on May 2, 2001, when the Supreme Court of Ohio denied further appellate review.

OPINIONS BELOW

The Opinion of the Ohio Court of Appeals, against which this *Petition* is directed, was issued on December 20, 2000. This Opinion is designated **Appendix "A," pp. 1a-26a**, in the Appendix to *Petition*. The Entry of the Ohio Court of Appeals denying the Motion For Reconsideration was also entered on December 20, 2000. Finally, the Entry of the Ohio Supreme Court denying further appellate review was entered on May 2, 2001, the critical date herein. It is designated herein as **Appendix "B," p. 27a.**

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio, as indicated above, was entered on May 2, 2001. The jurisdiction of this Court is invoked under Title 28 U.S.C., §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The fourth amendment to the United States Constitution;
2. The fifth amendment to the United States Constitution;
3. The sixth amendment to the United States Constitution;
4. Revised Code of Ohio, §2923.12;
5. Revised Code of Ohio, §2923.24;
6. Revised Code of Ohio, §2925.03;
7. Revised Code of Ohio, §2925.11.

STATEMENT OF THE CASE

Along with his brother, Jeffrey Richard, the petitioner was named a defendant in an indictment containing eleven (11) counts. The brothers were tried together and both were convicted. Thomas Richard, our petitioner, was indicted alone on counts 4, 7 and 10. He and his brother were jointly charged in counts 3 and 11. They were convicted on both counts.

Specifically, count 3 related to the alleged joint possession of drugs found in Jeffrey Richard's second floor bedroom, in violation of **R.C. of Ohio §2925.11**; count 4 charged Thomas Richard with trafficking in drugs on September 23, 1998,[1] an alleged violation of **R.C. of Ohio, §2925.03**; count 7 charged possession of drugs, likewise on the 23rd of September, in violation of **R.C. of Ohio, §2925.11**; count 10 charged carrying a concealed weapon, in violation of **R.C. of Ohio, §2923.12**. Count 11 involved the charge of possession of criminal tools, a violation of **R.C. of Ohio, §2923.24**. Also, the Court ordered the forfeiture of funds found at this petitioner's home. The seizure of these funds cannot be defended in law, logic or common sense.

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[1] The conviction here related to the alleged sale to an undisclosed informant whose identity the Court refused to require the State to disclose, despite the petitioner's contention the informant did not exist (*i.e.*, was a phantom) and that if he did exist, the officer was mistaken as to his identification of the petitioner.

The appeal from all of the verdicts, the forfeiture and the final orders rendered herein was rejected in the Order being appealed from. See **Appendix "A"**. Further appeal to the Ohio Supreme Court was likewise denied. (See **Appendix "B,"** ***infra*****, p. 27a**.)

A. Motion To Suppress

In this case an affidavit alleged, with reference to the petitioner's Beckman Avenue home, that the police were authorized to, in effect, seize anything they saw fit to seize. With reference to this affidavit, it is our belief the court that issued the warrant (who arguably never saw an affidavit it did not like) actually authorized the police to ransack the petitioner's home under the guise of conducting a search. The State's probable cause basis distills from the allegation in the original Affidavit for Search Warrant[2] that some unknown person just happened to tell the affiant (arguably that he, *i.e.*, this unknown person, had himself been told)[3] that Thomas

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[2] Actually there were two search warrants, hence two affidavits, involved in this case. The first warrant executed was at the Wade Park address, where petitioner's brother and their mother lived. This is where petitioner was, along with his family, when the police broke in. This search was also challenged on the basis of arguments made below.

[3] This inference is fairly drawn because there was nothing in this less than "bare bones" affidavit that even suggested this arguably phantom person spoke on the basis of first-hand knowledge.

Richard, the petitioner, uses his Beckman Avenue home as a "stash" house and his car to deliver drugs. Significant here, the alleged source was not even said to have had any first-hand knowledge of these asserted facts. Yet, the assertions attributed to him were gospelized by the affiant and, for aught that appears, the issuing judge as well.

Also, it was said that on September 23rd, seven or so days before the search was conducted, Thomas Richard was accosted by an alleged (said by petitioner and counsel to be a phantom) informant as he was leaving his mother's and brother's Wade Park home. Supposedly this informant stated he wanted to buy what turned out to be less than a gram of crack cocaine (the charge made in count 4). Here too it was said by the affiant that Thomas Richard then drove to his home on Beckman Avenue and returned shortly thereafter to the vicinity of the Wade Park home. There the officers claim this sale of less than one gram occurred between Thomas Richard and this alleged person (**Tr., pp. 337 and 359**).

Based on the above nebulous averments (made by an almost rookie police officer), the Judge issued this warrant. Obviously this was because, as the Court saw it, the "experiences" of this officer allowed him to know that people who deal in even such a meager quantity of drugs (a street pharmacist, at best) keep all, or at least most, of the various items of the trade listed in the warrant on their premises. Obviously such a position cannot, upon inspection, be validated.

Indeed, with reference to the sufficiency of the

affidavit, the critical issues in this *Petition* distill from certain averments in the affidavit which were prefaced by the bold, conclusory statement that petitioner and his brother were "engaged in drug trafficking" at this Beckman Avenue address. Specifically, the critical averments made in the affidavit for the search warrant included:

> ¶3. Within the past two weeks, affiant and other members of the police department observed a black male, approximately 5'8" tall, stocky build, medium to dark complexion, leave the premises at 8407 Wade Park Avenue driving a Beige 1985 Oldsmobile Cutlass automobile, Ohio License No. ASF 8457. Affiant followed the male to the above described 8722 Beckman Avenue premises *where he entered the side door of the premises*, stayed a short time, then drove back to the 8407 Wade Park Avenue premises. At the Wade Park address, the male was observed by affiant making hand to hand exchanges with individuals who went into the front yard or onto the front porch of the premises. In the experience and training of affiant, said activity is indicative of drug trafficking at the Wade Park premises.
>
> ¶4. Within the past week, affiant met with a *Confidential Reliable Informant* ("CRI") who confirmed that *Tom Richard was engaging in drug trafficking at the above described*

premises and that Tom and his brother "Jeff" were selling drugs at 8407 Wade Park Avenue. CRI also advised affiant that Tom Richard used the premises at 8722 Beckman as a "stash house" for his drug supply. CRI is made reliable in that CRI has provided information to affiant in the past and has participated in controlled purchases of drugs which have resulted in several arrests and seizures of drugs and other contraband for violations of State Drug Laws.

¶5. ... CRI was given a quantity of United States Currency the serial numbers of which had been recorded. CRI was taken to the vicinity of 8407 Wade Park Avenue where affiant observed CRI stand in front of the premises and talk with the black male previously described above. The male left the Wade Park address and was followed by other *members of the Cleveland Police Department to the above described premises where he was observed to enter the side door*, stay a short time and return to 8407 Wade Park Avenue. Affiant then observed the male make a hand to hand exchange with CRI who immediately left the vicinity and returned to the undercover vehicle at a predetermined location.

¶6. CRI handed affiant a white waxy substance believed to be crack cocaine. Said

> suspected crack cocaine was submitted to the SIU Lab where it tested positive for the presence of cocaine.
>
> ¶7. ... CRI advised affiant that CRI told the male that CRI wished to purchase a quantity of crack cocaine and gave the male a sum of money. In return, the male gave CRI a quantity of purported crack cocaine.

Affidavit for Search Warrant.[4] (Emphasis supplied.)

Our analysis of these averments starts with the fact that Thomas Richard stated in his testimony he never sold drugs to anyone (**Tr., p. 803**). His evidence also showed (contrary to the sworn statement in ¶5 of the affidavit [recited above] that he "enter[ed] the side door, stay[ed] a short time and returned to Wade Park,") that one simply could not gain entry to his upstairs unit on Beckman Avenue through the side door entrance (**id., p. 793**). Distilled then, the affidavit for the warrant to search petitioner's home simply recited what, at best, was merely the affiant's belief that drugs and the like would be found in a search and that this was so because someone had supposedly told him this home was "a stash house". The affiant obviously believed this was so even

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[4] Petitioner not only denied the events described in the affidavit ever occurred. This he did in a separate Affidavit filed pre-trial. He repeated his denials at the Hearing on his Motion To Suppress and during his trial testimony.

though it is clear the alleged source lacked any personal knowledge concerning this matter. Also, there were no "self-authenticating" details provided by the source that would at least suggest this reference to the home was not made up by the affiant or the source (if one exists).

Additionally, for those that are perceptive, the allegation that there was "drug trafficking" occurring at this address is inconsistent with the premises being used as a "stash house". Some of us know this. If the affiant did not, this is further proof these officers will literally make any statement they feel will serve them. This is particularly so where they are convinced they will not have to produce their alleged sources, as was the situation here.

With this being so, our courts should have taken note of the fact that in the boiler-plated affidavits, such as are rotely submitted in these cases, the affiant never credits his alleged source with having seen a cache of drugs, money, guns, etc., on the premises. And, that while it is almost always true that the warrants issued to Cleveland's so-called investigators are routinely based on *alleged* observations of seeing unidentified people going to the premises in a way that is said to be indicative of drug trafficking, which is then coupled with the equally unclad allegation that a single controlled sale took place near, in front of, or somewhere related to, the premises - - the situation here.

Next, as argued below, the indiscriminate acceptance of these naked, and unclad, representations made by these routine narcotics investigators (whose actual experiences are

often exaggerated) is an unfortunate reality. For what is said to be "experience" generally consists of these officers arresting people supposedly seen flagging down cars, stopping people for alleged traffic offenses and routinely seeing drugs or weapons (according to them) "in plain view". Also, their "experiences" include participating in searches of the homes of these street pharmacists (who are very minor players, at best) that sometimes result in the seizure of drugs, stolen property and the like from their persons and from their homes, usually searched with their consent.

Simply put, what seems to be overlooked, especially by most of our local Judges (some of whom have never seen an affidavit they did not like) is that in their effort to please the police, the courts we are referring to fail, or refuse, to view with any sort of concern, or even caution, these naked (sometimes invented) assertions which are so easily revealed as having been supplied by fictitious, or at best, undisclosed people.

B. THE MERITS

The drug charges made against Thomas Richard, for which he was convicted, centralized the alleged sale supposedly made by him on September 23rd to this alleged informant. It was said by Detective Milligan that this person (*i.e.*, the alleged informant) accosted Thomas Richard in front of 8407 Wade Park - - his brother's home. They were supposedly seen engaging in a conversation, following which Thomas Richard was said to have entered an '81 or '82 beige Oldsmobile Cutlass, which he supposedly drove to the Beckman Avenue address.

Detective Milligan says when he returned, Thomas Richard then made a hand-to-hand drug sale to the alleged informant (**id., p. 337**). While this detective (and the others as well) insisted they continued to survey these premises, no record of these asserted surveillances were kept, hence, we have their naked word they occurred. And, just as surely the testimony that they continued to observe traffic which indicated drug activity is more of the same doubletalk. Indeed, Detective Ruffin testified that he did not record any license plate numbers of the cars he observed because to do so would compromise the investigation[5] (**id., p. 467**).

Equally significant, when Detective Milligan was asked if they wrote a dated log, which recorded what was done on September 23rd, his answer also translated into a "no". (**Tr., p. 369-372**.) Likewise, the detectives did not have their informant write out anything concerning what he did, or what he said. (**Tr., p. 373**.) Also, no body microphones were used (**id., pp. 375-376**). This happened because, as Detective Milligan explained, "that's probably ... too hi-tech" for the Cleveland police department. The effect of all this is that we only have Detective Milligan's word for all that was said to have occurred prior to the issuance of the warrant.

It should also be noted that Detective Milligan was unable to tell us what time of the day on the 23rd they got to

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[5] How this would compromise his investigation, we were not told.

the area, beyond saying "it was probably early evening" (**Tr., p. 359**). As to any money having been given the informant for use in making this purchase, charged in count 4, the officer was not sure if they had a list or not (**id., pp. 361-362**). This is significant since the affidavit for the search warrant (as shown above, *ante*, pp. 4-6) clearly states in ¶5 that the "CRI was given a quantity of United States Currency the serial numbers of which had been recorded".

With regard to the car Thomas Richard was supposedly seen driving to Beckman Avenue, it should be noted that while the defense did not dispute the petitioner owned the beige Cutlass and we did not dispute a gun may have been found in it after it was seized and searched. Still it is also a fact that the State failed to produce any evidence to dispute Thomas Richard's testimony that the car was not in his possession when it was seized and indeed had not been in his possession for about three (3) days[6] (**id., p. 777**). Thomas Richard testified not only that he had given the car to a Benjamin Johnson to repair the brakes, he further added that this person was in the crowd that had gathered, and he told the detective this was the case (**id., pp. 778-779**). But, as is too often the case, trying to talk to a Cleveland police officer

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[6] Richard's testimony concerning the fact that he was not in possession of the beige Cutlass on the day of the arrest is augmented by his undisputed testimony that he was operating his work van that day. In short, it was also located on the premises while the search was being conducted (**Tr., p. 776**) and was itself searched (**ibid**).

who has made up his mind is like trying to convince a fool against his will -- the punch line is, even when that is done, he is still of the same opinion.

As to the officer's identification of Thomas Richard as a participant in the sale of September 23rd , the Record shows the following:

> Q. Now, it is true though, that you don't have any records which reflect any aspect of any of these purchases that you made, isn't that true?
>
> A. I didn't at this point. I don't recall everything any records of that, no.
>
> Q. Right. Do you recall me asking you this question. [When] you bring them, bring us whatever records you have that shows there were drug sales that you surveilled on the 23rd, 28th and the 30th. Can you do that?
>
> Your answer was, I don't have any records that shows what days the buys were actually made other than the fact that the dates are on the drug bag that is submitted to our evidence book.
>
> Do you recall giving that answer?

A. If it is in there and I said it, I believe you. I already have a copy of these questions. That's what it says.

Tr., pp. 393-394.

Indeed, this officer flat-out admitted he did not know the person he observed "was Thomas Richard" (**Tr., pp. 395-396**). This is truly significant, particularly since the officer admits the name Thomas Richard was placed by him on the petitioner sometime after the date the alleged sale was made (**id., pp. 346 and 395**). Even this is not all, this officer testified as to the search made at Wade Park where a black pouch was found containing a few grams of cocaine. This pouch was shown to have been found "in plain view" in Jeff Richard's bedroom. A person named Larry Bacon, who was visiting Jeff Richard when the warrant was executed, was shown to have also been in that room (**id., p. 785**). Bacon, of course, was not charged. Here too it should be understood Jeff Richard testified (albeit during the Motion to Suppress hearing) that this pouch belonged to Larry Bacon, the visitor. We contend Mr. Bacon was the so-called "CRI".

Back to petitioner's home, on Beckman Avenue. The Record shows these officers, while finding no drugs or the like of consequence, did find and seize $40,000.00. Clearly this money was taken by these officers on their own authority. This follows because it was not particularized in the warrant and the officers were aware (or should have been) that when they seized this money they did not have a probable cause basis for doing so.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

Here it seems clear enough from a reading of the affidavit, with reference to the search made of the Beckman Avenue home, that beyond the affiant's naked assumptions (which he says are based on his experiences) there is really nothing said that establishes probable cause to search for any identifiable items of property. At best we have the affiant's unsupported, even unsupportable, conclusions, which are really entitled to no weight in any probable cause determination. In other words, there are no particularized facts which indicate that a search "would uncover evidence of wrongdoing" (**Illinois v. Gates, 462 U.S. 231, at 236 [1962]**).

With this being so, it follows that the affidavit at best provided the Court that issued this warrant only the affiant's conclusions without also providing, as is required, a sufficient showing of some underlying factual circumstances. In short, what the Court was provided was the alleged informant's naked, conclusory, assertion that this home was a "stash house". Stated another way, there was nothing stated as to how the alleged source came to know this.

If that is enough of a basis for the issuance of a warrant, then we can expect counsel-opposite will make that argument.

Also, serious arguments are made herein which relate to the forcible entry made to the Wade Park address and the

extreme damage done to those premises; as well as, the physical abuse inflicted on those present. We also discuss the wholesale seizures made, on these premises as well, by these officers on their own authority. Additionally, we dispute the guilty verdicts with the arguments that none of these convictions can pass constitutional muster.

ARGUMENT NO. I

ALTHOUGH ALL SEARCH WARRANTS ARE PRESUMED VALID AND THEIR EXECUTION REASONABLE, SUCH PRESUMPTION CANNOT OVERCOME PROOF SHOWING THE AFFIDAVIT FAILED TO SET FORTH A PROBABLE CAUSE BASIS FOR THE SEARCH OF, OR THE SEIZURE OF CERTAIN FUNDS FROM, THE PETITIONER'S HOME.

A. There is nothing alleged in the affidavit which supports the inference the Court was required to draw in order to issue the warrant to search petitioner's Beckman Avenue home; that is, that narcotics or other evidence of illegal activity would be found on the premises.

We start with the asserted fact that the affidavit credits some unknown person as having reported that Thomas

Richard used his Beckman Avenue home as a "stash house" and that he used a described car to deliver his drugs. Of course, we were not told the basis, or the source, of this asserted knowledge or how this alleged person came to know these things. Aside from the fact that it is not even claimed in the affidavit the source had any personal knowledge as to the information imputed to him, the alleged information was not even dated; hence (for aught that appears) was stale.

Simply put then, the affidavit lacked any of the traditional indicia of reliability and was clearly insufficient to create a probable cause basis for the issuance of the warrant to search the Beckman Avenue home. This undeniably valid thesis is magnified by the fact that none of the various items set forth as things to be searched for and seized were particularly identified - - *i.e.*, beyond being generically described. The bottom line being, there was nothing stated in the affidavit which can even possibly be said to establish probable cause to seize any of the various items listed in the warrant.

The essence of this condemnation is that the warrant authorized the police to conduct a "plain view" search. Stated another way, the search actually conducted was one that qualifies as being general or exploratory, which the Constitution prohibits.

B. The police may not seize money encountered during a search (even what may be regarded as a large sum) based either on the bare

assumption that it must be drug proceeds *or* because in the officer's judgment it must have been involved in some way in drug activity and for that reason is seizable as contraband or as evidence.

The law is clear - - to seize private property, either, with or without a warrant, probable cause is required. This is really a hornbook principle. Here too it should be noted that aside from the generic description of money, as an item to be seized, the police cannot be said to have particularly described *the* money sought or seized from petitioner's home address, or the Wade Park address, as something to be searched for and seized. Indeed, the evidence shows that the police flat-out admitted they lacked any ability to describe any of the money seized from the premises. This follows because even as to the alleged sales involving a total of less than $100 - $150, the officer failed to even describe these funds (**Tr., p. 361-362**), if indeed there were such funds. This is so even though it was specifically stated in the affidavit for the search warrant that the "CRI was given a quantity of United States Currency the serial numbers of which had been recorded".

The upshot of the point here made is amplified by the fact that to date no Court, anywhere, has ever held that "currency" is "contraband". Even this is not all. No Court has ever held the mere presence of even a large sum of money, standing alone, is illegal or that its discovery provides a sufficient basis for its seizure. Obviously the officers in this case did not understand this. So postured, clearly these police

officers lacked any basis, probable cause or otherwise, to connect the seized funds to drugs, or any other illegal activity, under any known theory. Proof this is so will be further augmented by any attempt counsel-opposite makes, or offers, as a legal basis for the seizure.

ARGUMENT NO. II

GIVEN THE OFFICERS' TESTIMONY THAT THE FORCIBLE ENTRY INTO A HOME FOLLOWED WITHIN 2-3 SECONDS OF THEIR KNOCK, EVEN IF THIS WERE TRUE, SUCH AN ENTRY (GAINED BY THE USE OF A BATTERING RAM) WAS NONETHELESS UNLAWFUL AND INDEFENSIBLE, AND, GIVEN THE ABSENCE OF ANY PROOF THE OCCUPANTS REFUSED ADMITTANCE TO THE OFFICERS, THE CONCLUSION THAT THE WARRANT WAS ILLEGALLY EXECUTED IS CLEAR ENOUGH.

Granted the law seems clearly to be, at least elsewhere, that waiting a few seconds after a mere knock for a response (and we deny that any knock occurred here), is not enough lapsed time for any officer to conclude he was being refused entry under the "knock and announce" statute (here, **R.C. of Ohio, §2935.12**), or the fourth amendment, as this requirement has been defined in **Richards v. Wisconsin, 520**

U.S. 385 (1997).

Although one does not get this from any of Ohio's reported cases, under **Richards**, the triggering point for any forcible entry in these circumstances is only reached when the people inside have been alerted that the police outside want entry to execute a warrant.

So postured, one of the dispositive questions, which was not addressed by the trial Court, simply asks, did the State prove they were refused admittance before they broke in? Here the testimony provided by the original trespasser, officer Rick Sheppard, who used a battering ram to break down the door, is instructive. He testified that when he entered he did not see anyone scurrying around (**Tr., p. 163**). Most significant here, when specifically asked how long they delayed before *ramming* their way into the house, this officer testified "maybe three, four" seconds (**ibid**). This answer he punctuated by telling us that "three or four [seconds] would be enough time for us to get in without them being able to get to any guns or anything ..." (**Id., p. 163**).

Here, what should really be understood is that the "knock and announce" rule has long been regarded as being a part of the "fabric of early American law." At least this is what the Supreme Court said in **Wilson v. Arkansas, 514 U.S. 927, 933 (1995)**. Indeed it was expressly recognized in **Wilson** as forming "a part of the reasonableness inquiry under the Fourth Amendment" (**id., at p. 929**).

So postured, the focus of the knock and announce rule

seems clearly to be whether the people inside the home should have been alerted that the police wanted to gain entry to execute a search warrant. Here, of course, the point to be noted (a point that undoubtedly escaped counsel-opposite and arguably the trial Court as well) is that the purpose of the rule is that the people inside the premises targeted to be searched should know who is demanding entry and why they are doing so. And, they should be given an opportunity to surrender their privacy to those demanding entry.

Here too it should be noted a delay of five seconds or less has routinely been held to violate the Rule. See *e.g.*, **United States v. Nabors, 901 F.2d 1351, 1355 (6th Cir. 1990)**. Indeed, it would be totally unreasonable to imply a refusal of admittance under the facts of this case - - a case where counsel-opposite admitted there was no need to even knock (**Tr., pp. 272-275**) - - a position the trial Court did not reject.

Since the conclusion that the entry was illegal must be entered here, it follows that there is no way it can be said that despite this illegality, the searches and the arrest made thereafter can survive meaningful scrutiny. The same result is reached on the basis of the flawed execution of the warrant. Simply put, what they did to this home cannot be condoned.

With this being so, it follows that the arrest of Thomas Richard and the seizure of his car (which yielded the gun he was charged with possessing in count 10, and which was the basis for his criminal tools conviction) cannot survive meaningful scrutiny.

ARGUMENT NO. III

DUE PROCESS IS DENIED WHEN, FOR REASONS THAT CANNOT BE DEFENDED, THE TRIAL COURT REFUSES TO REQUIRE THE STATE TO DIVULGE THE IDENTITY OF THE ALLEGED INFORMANT WHO WAS SAID TO HAVE BEEN THE PURCHASER (AND THUS A PARTICIPANT) IN THE ALLEGED DRUG SALE CENTRALIZED IN THE CASE AGAINST THE ACCUSED.

For reasons that seem clearly to be undeniable, there appears to be an insurmountable barrier to our local judges requiring disclosure of alleged informants, who are said to be purchasers, in even alleged hand-to-hand drug transactions. What our judges rely on is the asserted fact that these alleged sales are always witnessed (although from a point a distance away) by some police officer. These contentions are really in the same category as alleged traffic violations, plain view observations, consents to search, and the old excuse that "we knocked and waited before entering". Simply put, testimony of this ilk must invariably be made to fill serious holes in the State's case.

The problem with this penchant for gospelizing this type of testimony, even where (as here) it is essential to the State's case, is that there seems clearly to be nothing an accused can say or do to convince our judges the police officer is lying. And, in situations such as we have here where it is

claimed (not only that the alleged sale never occurred) but the asserted informant does not exist (**Tr., p. 436**), or if he did exist he identified the wrong person to the police, our courts even refuse (as the Judge did here) to require the police to produce this person in order that the Judge can question him to insure he exists[7] (**id., p. 439**).

Something has to be wrong with this system. This follows because, as this attorney has argued in vain for years, the police in Cleveland are no better, or worse, than those in Los Angeles, Chicago, Pittsburgh, and New York. The only difference is, it is obviously easier in those cities to prove the police frame people. To believe otherwise one must truly be oblivious to current events.

We rest our case on such principles as distill from **Massachusetts v. Lewin, 405 Mass. 566, 542 N.E. 2d 275 (Mass., 1989); State v. Olsen, 726 F.2d 1347 (Kansas, 1986);** and, of course, **Roviaro v. United States, 353 U.S. 53 (1957)**. The Court in summarily rejecting our position actually ignored the fact that the cases he relied on all missed their mark and did not apply to our situation. (See **Tr., pp. 439-440**.) This indefensible position was adopted by the

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[7] On this narrow point the Record shows the trial Court, faced with the adamancy of our efforts to show the alleged informant was fictitious or the petitioner had been misidentified, made it clear he was not going to engage in any "in camera proceeding ... to find out the identity of the informant." (**Tr., p. 439**). Simply put, the Court was satisfied the informant existed because the police said so.

appellate court in the wake of its own flawed, ill-premised reasoning pattern. (See **Appendix "A," at pp. 19a-20a**.)

Also, it should be noted that informers testify every day in cases that range from murder on down. So why then should it be that if it is a drug case in Cuyahoga County, Ohio, the informant's life would be in such peril if he testified that the accused's right to confront his accusers can be sacrificed and this without any proof or findings of fact?

The critical point counsel has sought to make was attempted, not only in the hope that counsel-opposite will feel compelled to respond, it was also attempted in the belief this Court will gain from the patent flaws in counsel's response some further insight as to the extent this petitioner (and others) have been victimized by Ohio's informer rule. Our belief in these circumstances differs from that of the Ohio Courts, which so far as this counsel believes has never, in the light of **Roviaro**, found it necessary to require disclosure. The point here being that although this Court has held disclosure is required where it is "essential to a fair determination of a cause," **Roviaro, 353 U.S., at 60-61**, this edict falls on deaf ears in Ohio where the gospelization of the testimony of police officers has eliminated any need to ever present the purchaser in alleged drug sale cases.

Now we do concede an accused's interest in disclosure is substantially less important in the context of a suppression hearing than during the trial itself. However, in this case, given petitioner's sworn affidavit and trial testimony, that the alleged drug transaction never occurred (which can only be

read as saying the officer was outright lying or he had misidentified petitioner), it follows disclosure was required in both contexts.

This is so because if the officer lied about having witnessed petitioner make the sale described in his evidence, then clearly his affidavit was flawed. If, on the other hand, he was merely *mistaken* in his testimony that a sale actually witnessed by him involved petitioner, then clearly petitioner's conviction for making this sale cannot survive meaningful scrutiny. The upshot of this is that petitioner was victimized by an inability to prove the alleged purchaser did not exist, or if a purchase did occur, the officer's identification of petitioner as the seller was a case of mistaken identity.

The response of our Court of Appeals to the argument here made is easily stated. According to them, the officer testified he witnessed the transaction and identified the accused in Court. Obviously the point being, what more could possibly be required? (See **Appendix "A", at pp. 19a-20a**.) Our point here is easily stated. Given the accused's sworn testimony that no sale involving him occurred, ever, with anyone, clearly the alleged purchaser was an essential witness to the occurrence of the sale and the identification of the accused. So postured, his presence was obviously required.

ARGUMENT NO. IV

VERDICTS FINDING THE ACCUSED GUILTY[8] WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE.

We start here with the indisputable fact that while there are those who believe it could never be true of the police in Ohio (as has been shown to have occurred in Los Angeles, Chicago, Boston, Pittsburgh and New York City), the fact is police do lie - - even here in Cleveland! This is particularly so where, as here, we deal with these saccharine-like accounts rendered by these officers (as to observed drug sales, forcible entries, and rank searches of the ilk made in this case). Our belief is their stilted and improvised testimony of far too many of these alleged events should leave more than a bitter aftertaste.

On the other hand, while our local courts, as this case shows, are as prone as those anywhere else to gospelize the testimony of police officers, it is not always so elsewhere. For example, a Commission that investigated the New York police department has concluded that police officers in that

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[8] As shown above petitioner was convicted of charges that: he jointly possessed, along with his brother, drugs found in a room occupied by the brother in their mother's home (counts 3 & 7); that he sold drugs on the street to an undisclosed person (count 4); that he had a concealed weapon (count 10); and that he was in possession of criminal tools, which included the vehicle (count 11).

department often commit perjury. Indeed, it was found to be so prevalent (in that department) that it has its own nickname" "testilying". **Sexton, *New York Police Often Lie Under Oath, Report Says* (Times, April 22, 1994, p. 1.)** ***Cf.*****, United States v. Cortina, 630 F.2d 1207, 1213 (7th Cir. 1980)**.

With the above truth as a given (*i.e.*, that police from Cleveland can, and on occasion do, lie), consider **State v. Dodson, 43 Ohio App. 2d 31 (8th District 1974)**. Also see, **United States v. Alexander, 740 F. Supp. 437 (N.D. Ohio, 1990)**. Now in this case our appellate Court should have asked if what was shown here was not sufficient: what can any person whose home was in fact illegally entered produce that would satisfy them that an illegal entry occurred despite contrary testimony by the police? And, how does one who is being framed by a police officer, or misidentified by one, ever overcome the testimony of a police officer that he witnessed from a distance a drug sale involving the accused?

With this being so, consider the testimony of the officers here with reference to the alleged sale involving petitioner. Since no records of any type were kept by these so-called "experienced" officers, the Court and jury only had their word that they witnessed this sale from afar. Given the petitioner denied it ever happened: why is it that petitioner should invariably be disbelieved and the police believed? A critical fact here is the only reason we were deprived of the testimony of the alleged purchaser (assuming he exists) was the Court's ruling, which barred his disclosure. On the other hand, the fact that nothing was produced to corroborate the officers' testimony even as to his existence is hardly

something that should have been regarded, as it was by the Court, as a non-factor. And, inasmuch as the police testified they did not know beforehand the identity of the person they were able to identify for the first time at the trial as Thomas Richard, the petitioner, it follows this fact should have been sufficient to raise a reasonable doubt he was the seller.

As to the weapon petitioner was charged with possessing, given that another person was shown to have used and to have had possession of the car it was found in, it is really a raw conclusion to say Thomas Richard not only had possession of the car, but the gun as well on this date. This conclusion is augmented by the fact that petitioner was shown to have driven a different vehicle to the home where he was arrested, while eating dinner with his children. **(Tr., pp. 11-12, 17-24 and 778.)**

When all these facts, along with the testimony of these so-called "experienced" officers, are taken under consideration, it is at once apparent this petitioner was wrongly convicted on all counts.

ARGUMENT NO. V

IN ORDERING THE FORFEITURE OF FUNDS SEIZED FROM AN INDIVIDUAL'S HOME THE COURT CANNOT DO SO WITHOUT REGARD TO THE FACT THAT NO NEXUS WAS SHOWN, OR EVEN SOUGHT TO BE SHOWN, BETWEEN THE FUNDS INVOLVED AND ANY CRIMINAL ACTIVITY.

The law is clear beyond dispute that the existence of any sum of money, standing alone, is not enough to establish probable cause to believe the money is forfeitable. See **United States v. $5,000 In United States Currency, 40 F.3d 846, 850 (6th Cir. 1994); United States v. Baro, 15 F.3d 563, 568 (6th Cir. 1993)** ***and*** **United States v. $67,220.00 in United States Currency, 957 F.2d 280, 285 (6th Cir. 1992)**.

Given, as argued above, no Court has ever held that the mere existence of a large sum of money is illegal, it follows that the absence of any proof that these funds were involved in any way in any drug activity must be reckoned with. This is especially so since it is beyond dispute that "property of private citizens simply cannot be seized and held in an effort to compel the possessor to 'prove lawful possession'". **United States v. One Residence and Attached Garage Of Anthony J. Accardo, 603 F.2d 1231, 1234 (7th Cir. 1979)**.

The points here being made clearly show there is an enormously troubling aspect of the State's unchecked use of the forfeiture statutes in these circumstances. The same is true of the lack of due process buried in those statutes. See **United States v. All Assets Of Statewide Auto Parts, Inc., 971 F.2d 896, 905 (2d Cir. 1992)**. This condemnation of the use of the forfeiture statutes aside, under Ohio's forfeiture laws the probable cause threshold in a drug forfeiture case is the same probable cause threshold which is applicable everywhere else. In this sense the burden of proof is on the State (which was seeking the forfeiture) to prove the property was subject to forfeiture. So postured, we fully contend that

probable cause for forfeiture only exists where the State demonstrates a *nexus* between the seized property and illegal narcotics activity. See **United States v. $87,118.00 In United States Currency, 95 F.2d 511, 518 (7th Cir. 1996)**.

Since the State did not even attempt to show a nexus between the money and any narcotics- related activity, or other criminal activity, that arose above the level of suspicion, that fact alone should be deemed dispositive. Proof this is so will be borne out by the failure of counsel (in the State's response Brief) to come up with what we regard as the required narcotics-nexus to satisfy its burden of proof in the context of the *in rem* forfeiture proceedings resorted to in an effort to forfeit these funds.

Simply put, there is nothing that ties this money to any narcotics activity that the State knew about or to any crime that was occurring when the police seized these funds. This is important because the right to seek the forfeiture of any funds requires as a necessary condition precedent that the funds must be "lawfully seized". So postured, the bottom line here, which this Court should endorse, is that the police (even those in Cleveland, who act as though they are above the law) may not seize money on their own authority. Additionally, they cannot, with impunity cause money to be forfeited, based on their bare assumption that most people do not have large sums of money lying around. Equally pernicious is the further assumption (arguably indulged in by the Court) that if they do have such funds laying around, they must be involved in drugs or some other sinister activity. Just as surely, the State cannot require explanations for the existence of any sum

of money *absent* an ability to establish a valid nexus between such funds and some illegal activity. Counsel, of course, will specifically address this issue as well.

CONCLUSION

If nothing else, it could not be any clearer that within the four corners of the affidavit to search petitioner's home, probable cause was not set forth. With this being so, if this Court subscribes to the notion that mere suspicion, rumor or even strong reasons to suspect are not sufficient to establish probable cause, this aspect of the fourth amendment issue should be resolved in petitioner's favor.

Next, the entry into the Wade Park residence, which resulted in Thomas Richard's arrest and the seizure of his car, must likewise be viewed as the type of illegality that requires all fruits of such action be suppressed. Thus, even if it is said the affidavit to search the Wade Park address was good, still the search was bad because its execution was bad both as to the method of entry and as to the intensity of the search itself.

Also the evidence seized (although illegal), even after being augmented by the State's proof, still failed to satisfy the sufficiency requirements needed for a conviction.

Postured by the above arguments, this cause should be reviewed. And this to the end that the judgement of the Ohio Court of Appeals can be reversed and the case remanded with directions to enter a judgment voiding the convictions and the orders of forfeiture entered herein.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

APPENDIX A

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

[Filed December 20, 2000]
NO. 76796

STATE OF OHIO,
Plaintiff-Appellee

v

THOMAS RICHARD,
Defendant-Appellant

OPINION BY:
JAMES M. PORTER

JOURNAL ENTRY AND OPINION

JAMES M. PORTER, J.:

Defendant-appellant Thomas Richard appeals from his convictions for possession of drugs (R.C. 2925.11), trafficking in cocaine (R.C. 2925.03), carrying a concealed weapon (R.C. 2923.12) and possession of criminal tools(R.C. 2923.24). Defendant contends the trial court erred in failing to suppress illegally seized property; in not requiring the State to identify the specific purchasers of illegal drugs; in

denying defendant's motion to acquit; and in ordering forfeiture of property seized. For the reasons hereinafter stated, we affirm.

On January 12, 1999, defendant filed a motion to suppress and for return of illegally seized property. Subsequently, on February 11, 1999, the trial court held a hearing on this motion. At the hearing, the State presented the testimony of several members of the SWAT team who executed the search warrant. The defendant then presented the testimony of several witnesses who were present in the 8407 Wade Park home at the time the SWAT team executed the search warrant: defendant Thomas Richard; Jeffrey Richard, defendant's brother and co-defendant; Challie Kelly, defendant's brother; and Jimmie Richard, defendant's mother.

Defendant denied that he ever participated in a drug transaction, denied that he ever stored drugs in a 1985 Beige Cutlass Oldsmobile and denied that the Beckman Road house was a "stash" house for storing drugs. He also stated that never entered the side door of the Beckman Road house as alleged by police in the search warrant affidavit as he always used the front entrance. He thereafter testified to the events that transpired when the SWAT team raided the Wade Park Avenue home. He claimed that the SWAT team never knocked on the door but immediately bashed in the door.

After the SWAT team conducted the search of the Wade Park Avenue house, the defendant testified that he was then taken to the Beckman Road house. After kicking in the outside door, the SWAT team then used a key to open another door leading into the home. The key was found on a key ring

found at the Wade Park Avenue house. The Beckman Road residence was then searched.

On cross examination the defendant claimed that his residence at the time the two homes were searched was 1585 East 84th Street. He claimed a woman named Dacia Love lived at the Beckman Road house.

Dacia Love testified that she lived at the Beckman Road address and that she was defendant's girlfriend and mother of his four children. She stated that defendant stayed at the Beckman Road address "off and on" and that he paid the rent for the house. She claimed that she also has another home on Wade Park but that she and the children live at the Beckman Road address.

Defendant's brother and co-defendant Jeffrey Richard testified to the search by the SWAT team. On cross examination he testified that he resided at the 8704 Wade Park home. He testified that his Cadillac was confiscated from the front of the house along with defendant's beige Cutlass. He said that defendant's Cadillac at the Beckman Road house was also seized.

Calvin Williams, Sergeant of the SWAT team, testified that his unit was requested to obtain a search warrant to be executed at 8407 Wade Park, Cleveland. Sgt. Williams explained that the SWAT team was usually used on warrants that are deemed to be high risk. At the SWAT team briefing, prior to the action, the officers learned details about the premises to be searched. Specifically, they were informed that there were guns involved; there were children at the

residence; there was a lot of recent police activity at the residence; there were drugs involved; and that "there were several armed males that frequented the house and also lived in the house." When the team arrived at the house, they went onto the front porch, verified the address and gained access to the house by ramming the door. Sgt. Williams testified that before ramming the door he yelled, "police" as they always do and waited about five to six seconds. This testimony was corroborated in large part by SWAT team Officer Dennis Blotnik who participated in the action.

On cross-examination, Sgt. Williams explained that not only did they yell "police" but they also made a great deal of noise to emphasize the fact that they were the police. Furthermore, Williams testified that they waited about five to six seconds after announcing "police," there was no reply, even though they knew there were people inside, before ramming the door.

Officer Rick Sheppard testified that he was also present as a member of the SWAT team on September 30, 1998. He was the designated doorman that evening and was responsible for the ram. He testified that he approached the door, squared up with it, yelled "police," and then knocked on the door with the ram. When he got no answer, he hit the door open. He testified that the SWAT team was told that there were extensive drug sales going on in the house; that there were firearms in the house; and that on the evening before, detectives witnessed zone cars at the house in connection with shots fired. Officer Sheppard acknowledged that this information "absolutely" played a role in the way that the SWAT team gained entry into the home. On cross-

examination, Officer Sheppard explained that he waited about four seconds before ramming the door in. That was enough time to allow a response, but not enough time for the occupants to get to any guns.

Detective Richard Ruffin, the affiant on both the 8407 Wade Park and 8722 Beckman Road search warrants, testified regarding the surveillance that had been conducted prior to obtaining the warrants. He stated that citizen complaints were received by the Cleveland Police Department that a "Tom Richards" or "Tom Richardson" was engaged in drug trafficking at the 8722 Beckman residence and that the suspect also keeps drugs in his 1985 beige Oldsmobile Cutlass. Citizen complaints were also received indicating that a "Tom Richards" and his brother, "Jeff" were engaged in drug trafficking at 8407 Wade Park Avenue.

The detective stated that the surveillance lasted about a week or two. During this time a large amount of vehicular and pedestrian traffic was witnessed coming and going from the Wade Park address. The individuals visiting the address would engage a male in a brief conversation and then a hand to hand exchange would take place. The detective identified the defendant and his brother Jeffrey as the males he saw take part in the hand to hand transactions.

The Street Crimes Unit conducted three controlled buys using a confidential informant: one from defendant Thomas Richard and two from Jeffery Richard. During one of the controlled buys, the informant had a brief conversation with defendant in the front yard of the home and then walked away without making an exchange. Defendant then drove

away in his beige Cutlass. The informant told the detective that the defendant told him he had to go and get the drugs. Defendant was followed to 8722 Beckman where he stayed approximately five to seven minutes before returning to 8407 Wade Park. The informant returned and purchased drugs from defendant.

Det. Ruffin also testified that the reason SWAT was used to gain entrance was because there was believed to be a lot of weapons in the house and there was also a large volume of people in the house. Det. Ruffin further testified that it is easy to destroy narcotics prior to the entry of police. Defendant also had a felonious assault arrest in 1995.

Det. Ruffin testified that entrance to the Beckman Road case was gained by using a key obtained from the Wade Park home. He testified that he was aware defendant lived in the upstairs part of the duplex as his name was on the utilities and his 1995 felonious assault arrest listed Beckman as the address.

Detective Ruffin testified on cross examination that $ 44,045 in cash was seized from the Beckman Road house. Det. Ruffin testified that the money was seized due to complaints that the Beckman Road house was a "stash" house and that in his experience the drugs and money are usually kept at a different place from where the drugs are sold. The detective did not find any of the "buy money" in the $ 40,000 stash. On redirect, Det. Ruffin testified that seized from the Beckman Road address were two shotguns; two scales; suspected cocaine from the kitchen table; suspected marijuana from the front bedroom; $ 40,000 from a safe that was kept

inside a dryer in the kitchen; and $ 4,045 recovered from a dresser drawer; and a Cadillac belonging to the defendant.

Detective Richard Milligan also testified about the circumstances that resulted in the surveillance of the area and the search warrant issued on the 8407 Wade Park and 8722 Beckman Road premises.

At the conclusion of Det. Milligan's testimony, the parties presented their closing arguments regarding the motion to suppress and return of illegally seized property. On February 25, 1999, the trial court ordered that two Cadillacs be returned to the defendant and Jeffrey Richard. Subsequently, on June 16, 1999, the trial court denied defendant's motion to suppress and for return of illegally seized property.

After several continuances, defendant's trial finally commenced on June 22, 1999. The State presented the testimony of several police officers who were involved in the execution of the search warrants for 8407 Wade Park and 8722 Beckman.

Det. Milligan testified that they set up surveillance at 8407 Wade Park and 8722 Beckman Road after receiving complaints from Crime Stoppers. The police were given information that two brothers, "Tom" and "Jeff" were selling drugs out of their mother's home on Wade Park Avenue. Descriptions of the two men were also given. During surveillance, they observed heavy pedestrian and vehicular traffic at the Wade Park address. With the aid of binoculars, they witnessed individuals visiting the residence engaging in

hand-to-hand transactions in the front yard and porch area or coming and going from the house for a short period. The night before the search warrants were executed, shots were fired at the Wade Park address and several zone cars responded.

He described a controlled buy on September 23, 1998, with the assistance of a Confidential Reliable Informant (CRI). Det. Milligan and his partner Det. Terry Preston met with the CRI and set up the controlled buy from defendant which they observed through binoculars in the front yard. The CRI approached the defendant with $ 50 and asked for drugs. After a few moments of conversation, the defendant entered a beige Cutlass and drove off. About 10 to 15 minutes later, defendant returned and gave the CRI the drugs.

After the first controlled buy from defendant, Det. Milligan testified that they continued their surveillance, and on September 28 and 30, 1998, second and third controlled buys were made from defendant's brother Jeffrey Richard with the assistance of a CRI. The buy on September 30th occurred about two hours before the search warrant was executed for the purpose of placing the police buy money in the house.

Det. Milligan testified that he participated in the searches of 8407 Wade Park and 8722 Beckman. At Wade Park, he found a black vinyl leather-like pouch in Jeffrey Richard's bedroom which contained five rocks of crack cocaine, $ 173 in U.S. currency and the police buy money from the last controlled buy. Three loaded guns were also located in that same bedroom, two under the mattress, a .380

automatic and a .38 caliber revolver. The third gun, a .25 caliber Raven, was located on the dresser. Det. Milligan testified that he knew this to be Jeffrey Richard's bedroom based on the personal papers found there.

Det. Milligan testified that a loaded .38 caliber revolver was recovered under the front seat of the defendant's beige Cutlass Oldsmobile. At the Beckman Road address they found $ 40,000 in a safe located in the kitchen dryer. The money was bundled in $ 2,000 amounts. He did not believe this money came from a bank as the dollar amounts were in random order.

Det. Preston also testified regarding the surveillance of 8407 Wade Park and 8722 Beckman Road, the controlled buys, the obtaining of the search warrant, and the execution of the warrant. He testified that during the execution of the warrant, he was accompanied by Sgt. James Lewis, Det. Milligan, Det. Ruffin, Det. Jamusca Britten, Det. Matthew Speights and other members of the SWAT team. He testified that the SWAT team is used in the execution of a search warrant when the situation is determined to be extremely dangerous. Det. Preston testified that at 8407 Wade Park a safe was found which they learned belonged to Jeffrey Richard. The safe contained $ 10,043 in cash and a tempered glass tube which is often used to cook or process crack cocaine.

Sgt. Lewis testified to the execution of the warrants at the two homes. He stated that the two scales found at the Beckman Road house were triple beam scales which are more sensitive scales than an ordinary kitchen scale. He stated that

in his 33 years of experience as an officer, the scales were indicative of drug activity.

Det. Ruffin, Det. Britten, Det. Walker and Det. Speights also testified for the prosecution regarding the execution of the search warrants for 8407 Wade Park and 8733 Beckman Road.

At the conclusion of the State's case-in-chief, the defense moved for a Crim.R. 29 motion for acquittal. This motion was denied by the trial court.

The defense then presented the testimony of Jimmie Richard, Dacia Love, Challie Kelly and defendant who were all present at 8407 Wade Park at the time the search warrant was executed. They all testified to the SWAT team's storming of the home with their guns pointed and ordering the men to the floor and the women and children to the couch.

On July 7, 1999, the jury returned its verdict finding defendant guilty of two counts of possession of drugs (R.C. 2925.11); one count of drug trafficking (R.C. 2925.03), one count of carrying a concealed weapon (R.C. 2923.12) and one count of possession of criminal tools (R.C. 2923.23). Defendant's post-trial motions for acquittal and for a new trial were denied by the trial court. Defendant was subsequently sentenced to six months on each count, with all to run concurrent to each other except for Count Three, possession of drugs, which was to run consecutive with the other counts, for a total of 12 months. Thereafter, the trial court pursuant to defendant's motion merged one of the counts for possession

of drugs with the count for drug trafficking and dismissed the possession count.

We will address defendant's assignments of error in the order presented.

I.

THE COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS.

In his first assignment of error, defendant asserts that there was insufficient probable cause to support the search warrant issued for the Beckman Road House. Defendant asserts that, as a result, the search of the home was unreasonable and any items seized during the search were inadmissible and should have been suppressed.

The Fourth Amendment to the United States Constitution guarantees people the right to be free from unreasonable searches and seizures and provides that no warrants shall issue but upon probable cause. When reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant, the duty of the reviewing court is only to ensure that the issuing judge had a substantial basis for concluding that probable cause existed. *State v. George* (1989), 45 Ohio St. 3d 325, 544 N.E.2d 640, paragraph two of the syllabus, following *Illinois v. Gates* (1983), 462 U.S. 213, 238-239, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527. To determine the sufficiency of probable cause in an affidavit in support of a search warrant, the issuing judge must:

> Make a practical, common-sense decision whether given all of the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id. at paragraph one of the syllabus. A reviewing court should accord great deference to the judge's determination of probable cause, and doubtful cases should be resolved in favor of upholding the warrant. *Id.*

In the instant case, the affidavit in support of the search warrant was signed by Det. Ruffin and states that over the past month, several citizens' complaints and a Crime Stoppers complaint were received by the police department that "Tom Richards" or "Tom Richardson" and his brother "Jeff" were trafficking in drugs at 8407 Wade Park Avenue. The crime stopper's report indicated that the house on 8722 Beckman Road was a "stash" house.

Surveillance of the Wade Park residence indicated very heavy pedestrian and vehicular traffic with suspected drug trafficking observed at that location. The affidavit states that members of the police department were contacted by a confidential informant who told them the defendant's name was Tom Richards and that he was selling drugs from the Wade Park address and used the address on Beckman Road as a "stash house." The officers thereafter set up a controlled buy using the CRI. They observed the CRI approach the

defendant and saw the defendant leave the Wade Park house in a beige Cutlass, drive to 8722 Beckman Avenue and a short time later returned to 8407 Wade Park where he was then gave the CRI the drugs. The affidavit also stated that the police observed other similar activity between the defendant and people who would come to the Wade Park house. The defendant was seen to leave the Wade Park address and followed to the Beckman Road address. Upon his return, the defendant was observed making hand-to-hand transactions with the various individuals. The affidavit expresses that this activity is indicative of drug trafficking. The affidavit also described the two controlled purchases by the CRI from Jeffrey.

We find, based on this information contained in the affidavit, that the judge had a "substantial basis" for concluding that sufficient probable cause existed for a search warrant. In this finding, we must note the great deference that must be accorded to the judge's probable cause determination and that any doubts are to be resolved in upholding the warrant.

We find that the trial court could justifiably find that the search of the home was reasonable based on the circumstances that existed at the time of the execution of the search warrant. Thus, the trial court correctly denied defendant's motion to suppress.

Assignment of Error I is overruled.

II.

GIVEN THE OFFICERS' TESTIMONY THAT ENTRY INTO THE WADE PARK HOME FOLLOWED WITHIN 2-3 SECONDS OF THEIR KNOCK, EVEN IF THIS WERE TRUE, THE FORCIBLE ENTRY (GAINED BY THE USE OF A BATTERING RAM) WAS NONETHELESS UNLAWFUL AND INDEFENSIBLE. BECAUSE THIS WAS SO, THE ARREST OR INCIDENT TO THE EXECUTION OF THE WARRANT MUST BE DEEMED FRUIT OF THE POISONOUS TREE.

Defendant further asserts that the SWAT team's unannounced entry into the residence was unlawful. We disagree.

The "knock and announce" rule on which defendant relies is codified in R.C. 2935.12(A), which provides for forcible entry in executing a search warrant:

> When executing a search warrant, * * * the law enforcement officer, * * * may break down an outer or inner door or window of a dwelling house or other building, if, after notice of his intention to make the arrest or to execute the search warrant * * * he is refused admittance, but the law enforcement officer * * * executing the search warrant shall not enter a house or building not described in the warrant.

In the instant case, there is conflicting testimony regarding whether the SWAT team knocked on the door and announced its presence prior to knocking down the door and entering the residence. Even if we assume that the SWAT team failed to knock and announce in violation of R.C. 2935.12(A), such an unannounced intrusion may still be reasonable under the Fourth Amendment.

In *State v. King,* 136 Ohio App. 3d 377, 736 N.E.2d 921 (1999), this Court recently addressed the reasonableness of a "no knock" entry of a residence. In *King,* we stated:

> The United States Supreme Court recently addressed the application of the "knock and announce" rule with regard to the "reasonableness" standard for searches under the Fourth Amendment. *See Richards v. Wisconsin* (1997), 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed. 2d 615. In *Richards,* the Court determined that in felony drug investigations a "no knock" entry, wherein the police are justified in dispensing with the "knock and announce" requirement, may be done where the police have,
>
> "a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective

> investigation of the crime by, for example, allowing destruction of evidence."

520 U.S. at 394, 117 S. Ct. at 1421.

Richards further stated that whenever the reasonableness of a no-knock entry is challenged, this "reasonable suspicion" showing by the police is not a high one and that the reasonableness of the officer's decision must be evaluated "as of the time they entered the" dwelling. 520 U.S. at 394-395, 117 S. Ct. at 1422.

In the instant case, Sgt. Williams of the SWAT team testified at the suppression hearing that prior to executing the warrant, they were briefed that this was a drug case, that there were guns involved, and that "there were several armed males that frequented the house and also lived in the house." Det. Ruffin testified that the reason the SWAT team was used to gain entry to the 8407 Wade Park residence was because it was believed that there were a lot of weapons in the house and there was also a large volume of people in the house. Officer Sheppard further testified that the SWAT team was told that there were extensive drug sales going on in the house, that there were firearms in the house and that on the evening before detectives witnessed zone cars at the house in connection with shots fired. Officer Sheppard further acknowledged that this information "absolutely" played a role in the way that the team gained entry into the house.

We find that the SWAT team was sufficiently justified in failing to adhere to the "knock and announce" requirement as there was "a reasonable suspicion" that knocking and

announcing its presence, under these circumstances, would have been dangerous to the officers involved and perhaps the inhabitants themselves. During the one or two week surveillance of the residence, the police obtained a significant amount of information regarding the drug and gun activity that took place in the home. Based on the exigent circumstances in this case, we find that it was reasonable for the SWAT team to conclude that an announced entry into the residence would have allowed the occupants to obtain their weapons and/or destroy evidence. Regardless of whether the SWAT team announced its presence, this entry was reasonable under the Fourth Amendment.

Furthermore, the evidence indicated that the defendant did not reside at the Wade Park home. The Ohio Supreme Court in *State v. Coleman* (1989), 45 Ohio St. 3d 298, 306, 544 N.E.2d 622 held that "Fourth Amendment rights are personal in nature. A person who alleges error by the use of evidence taken from someone else's property cannot claim that his own rights have been violated." *See,* also, *State v. Bridges,* 1989 Ohio App. LEXIS 4969 (October 5, 1989), Cuyahoga App. No. 55954, unreported. The defendant therefore lacks standing to raise this argument.

Assignment of Error II is overruled.

III.

THE COURT ERRED WHEN, FOR REASONS THAT CANNOT BE DEFENDED, HE REFUSED TO REQUIRE THE STATE TO DIVULGE THE IDENTITY OF THE ALLEGED INFORMANT WHO WAS SAID TO HAVE

BEEN THE PURCHASER (AND THUS A PARTICIPANT) IN THE ALLEGED DRUG SALE CENTRALIZED IN THE CASE AGAINST APPELLANT.

The standard of review that we must apply to this case is whether the trial court abused its discretion in refusing to order the State to disclose the identity of the confidential informant. *State v. Brown* (1992), 64 Ohio St. 3d 649, 597 N.E.2d 510; *State v. Feltner* (1993), 87 Ohio App. 3d 279, 281, 622 N.E.2d 15. We will not reverse a trial court's decision denying a request for disclosure absent an abuse of discretion. *Feltner, supra,* at 282. The term "abuse of discretion" connotes more than an error of law or judgment, it implies that the court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140.

A criminal defendant is entitled to disclosure of a confidential informant's identity only where the informant's testimony is either: (1) vital to establishing an essential element of the offense charged; or (2) helpful or beneficial to the accused in preparing a defense. *State v. Williams* (1983), 4 Ohio St. 3d 74, 446 N.E.2d 779, syllabus. If the informant's degree of participation is such that the informant is essentially a State's witness, the balance tilts in favor of disclosure. *Id.* at 76. However, where disclosure is not helpful to the defense, the prosecution need not reveal the informant's identity. *Id.* The defendant bears the burden of establishing the need for learning the informant's identity. *Feltner, supra; State v. Parsons (*1989), 64 Ohio App. 3d 63, 69, 580 N.E.2d 800.

The question of disclosure of a confidential informant becomes a balancing of competing interests. The defendant's right to confront his or her accusers, and the state's right to preserve the anonymity of informants. *State v. Phillips* (1971), 27 Ohio St. 2d 294, 272 N.E.2d 347. The underlying thought process relative to the "informants' privilege" is discussed in *State v. Roe* (1971), 26 Ohio St. 2d 243, 246, 271 N.E.2d 296:

> "* * * The purpose of the privilege is the furtherance and protection of the public in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials, and, by preserving their anonymity, encourage them to perform that obligation. *See Roviaro v. United States* (1957), 353 U.S. 53, 59, 77 S. Ct. 623, 1 L. Ed. 2d 639."

State v. Crawford, 1998 Ohio App. LEXIS 2603 (June 11, 1998), Cuyahoga App. No. 72893, unreported.

Det. Milligan and Det. Preston testified that they searched the CRI, gave him the buy money, observed the CRI meet with defendant, and observed the CRI return with crack cocaine and without the buy money. Defendant has failed to show that disclosure of the CRI's identity was vital to establishing an essential element of the offenses charged or was helpful in preparing his defense. The trial court's denial of defendant's request for disclosure was based on a balancing

of the public interest and protecting the public flow of information against defendant's right to prepare his defense. We cannot find that this decision was unreasonable, arbitrary or unconscionable to constitute an abuse of the trial court's discretion.

Assignment of Error III is overruled.

IV.

THE VERDICTS FINDING THE APPELLANT GUILTY OF THE CHARGES: HE JOINTLY POSSESSED DRUGS FOUND IN THE HOME THAT BELONGED TO HIS BROTHER (COUNT 3); HE SOLD DRUGS TO AN UNIDENTIFIED PERSON (COUNT 4); HE WAS IN POSSESSION OF DRUGS FOUND IN THE WADE PARK HOME (COUNT 7); HE WAS CARRYING A CONCEALED WEAPON (COUNT 10); AND, THAT HE WAS IN POSSESSION OF CRIMINAL TOOLS, WHICH INCLUDED HIS VEHICLE AND OTHER ITEMS HENCE, THE COURT ERRED WHEN IT DENIED THE APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL, WHICH WAS RENEWED AT THE CLOSE OF THE EVIDENCE AND POST-TRIAL.

Defendant asserts that the trial court erred in not granting the Crim.R. 29 motion for acquittal because there was insufficient evidence to support a conviction. We disagree.

Crim.R. 29(A) provides that a trial court "shall order the entry of a judgment of acquittal * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." A trial court may not grant an acquittal by authority of Crim.R. 29(A) if the record demonstrates that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt. *Wolfe* (1988), 51 Ohio App. 3d 215, 216, 555 N.E.2d 689. In making this determination, all evidence must be construed in a light most favorable to the prosecution. *Id.*

An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The standard of review with regard to the sufficiency of evidence was recently summarized by the Supreme Court in *State v. Smith* (1997), 80 Ohio St. 3d 89, 113, 684 N.E.2d 668, as follows:

Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the jury verdict, *State v. Thompkins* (1997), 78 Ohio St. 3d 380, 386, 678 N.E.2d 541, 546, whereas the "weight of the evidence concerns 'the inclination of the *greater amount of credible evidence,* offered in a trial, to support one side of the issue rather than the other.'" (Emphasis *sic.) Id.* at 387, 678 N.E.2d at 546.

In reviewing the record for sufficiency, "the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560. * * *

Defendant asserts that there was insufficient evidence to support his conviction for the controlled buy on September 23, 1998 as the officers' testimony was the only evidence of the buy as no records were shown indicating that the buy in fact occurred, and the CRI was undisclosed making it impossible to cross examine him. Whether the officers' testimony regarding the controlled buy was credible or not was for the trier of fact to determine. Construing their testimony in the light most favorable to the prosecution, there was sufficient evidence of the controlled buy.

Defendant also argues that since there was evidence that another person drove defendant's beige Cutlass Oldsmobile in which the gun was found, there was insufficient evidence to support that the weapon was indeed his. However, evidence was presented that the defendant had two cars. One was a Cadillac located at the Beckman Road address. The other was the beige Cutlass. When the search warrant was executed, the defendant was at the Wade Park address, and his Cutlass was parked out front. This leads to the reasonable conclusion that the defendant drove the car to the Wade Park address. Therefore, there was sufficient evidence that defendant owned the gun found under the driver's seat.

Although the defendant raises in his assignment of error that the evidence was insufficient to support the joint possession and trafficking of drugs with his brother and the criminal tools count, he does not argue the insufficiency in the body of the brief. We nonetheless find the evidence was sufficient to support these counts as well, as the officers testified to the extensive drug transactions that occurred at the Wade Park residence. They witnessed both the defendant and his brother conducting the transactions. The officers also testified that they witnessed the defendant driving his beige Oldsmobile from the Wade Park home to the Beckman home where he would then, after staying at the Beckman residence for several minutes, drive back to the Wade Park home to finish the drug transactions. Although, again, this is solely supported by the officers' testimony, we find their credibility is for the trier of facts.

The trial court properly overruled defendant's Crim.R. 29(A) motion for acquittal.

Assignment of Error IV is overruled.

V.

THE COURT ERRED IN ORDERING THE FORFEITURE OF THE $ 40,000 IN FUNDS SEIZED FROM THE DEFENDANT'S HOME.

In his final assignment of error, defendant asserts the State failed to establish a sufficient nexus between the $ 40,000 found in the dryer at the Beckman Road house.

We find that pursuant to R.C. 2933.41(C), defendant lost the right to possession of the money as there was a sufficient showing that the money was used in the commission of drug offenses. We also find that the $ 40,000 constituted contraband pursuant to R.C. 2933.43(A).

R.C. 2933.41 (C) (1) provides that a person loses any right that he or she may have to the possession and ownership of property if the property "was the subject, or was used in a conspiracy or attempt to commit, or in the commission, of an offense other than a traffic offense, and the person is a conspirator, accomplice, or offender with respect to the offense." Furthermore, R.C. 2901.01 (13) (e) defines contraband as:

> Any controlled substance as defined in *section* 3719.01 of the Revised Code, or any device, paraphernalia, money as defined in section 1301.01 of the Revised Code, or other means of exchange that has been, is being, or is intended to be used in an attempt or conspiracy to violate, or in a violation of, Chapter 2925 or 3719 of the Revised Code.

We find that it was reasonable to conclude that the $ 40,000 was associated with the drug activity at the 8407 Wade Park residence. Several witnesses testified to the significant amount of drug activity taking place at the Wade Park home and defendant was seen traveling between the Wade Park and Beckman homes in making drug sales. The money was bundled together in amounts of $ 2,000 with the

various amount of the bills in random order. Two scales commonly used in drug activity were also found on the premises. There was a sufficient showing that the cash was used in the commission of drug trafficking, and therefore, the trial court correctly determined that it was contraband subject to forfeiture.

Assignment of Error V is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

DYKE, A.J., and

ROCCO, J., CONCUR.

JAMES M. PORTER

JUDGE

N.B. This entry is an announcement of the court's decision. *See* App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). *See,* also, S.Ct.Prac.R. 112, Section 2(A) (1).

APPENDIX B

THE SUPREME COURT OF OHIO

[Filed May 2, 2001]
No. 01-263

STATE OF OHIO,
Appellee

vs

THOMAS RICHARD,
Appellant

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by James R. Willis, Esq.
(Cuyahoga County Court of Appeals; No. 79796)

/s/_____
THOMAS J. MOYER
Chief Justice